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IN THE

Supreme Court of the United States

October Term, 1925.

No. 105.

MIDLAND LAND AND IMPROVEMENT COMPANY, *Appellant*,
vs.
THE UNITED STATES, *Appellee*.

BRIEF ON BEHALF OF APPELLANT.

STATEMENT.

This is an appeal from a judgment of the Court of Claims in favor of appellee and dismissing the petition of appellant.

To avoid confusion the appellant will hereinafter be referred to as the contractor, and the appellee as the defendant.

In the suit it was sought to recover the retained percentages amounting to $33,998.15, upon the following grounds:

(1). That the defendant had wrongfully annulled the contract.

(2). That the defendant had not shown that the uncompleted work was done under another contract which did not materially depart from the annulled contract,

and that it was incumbent upon the defendant to show this.

On August 12, 1907, the contractor entered into a contract with the defendant whereby the contractor agreed to dredge approximately 4,177,110 cubic yards of material in order to form a channel through Newark Bay and Passaic River, New Jersey. On August 3, 1911, a supplemental contract was entered into between the parties which provided for the widening of the channel within certain points and an increase in materials to be dredged by an amount not to exceed ten per centum of the amount of material specified to be dredged under the terms of the original contract. The price of work under both contracts was 16¼ cents per cubic yard, scow measure.

In paragraph 16 of the first contract the following provision is made:

> "A percentage of ten (10) per centum will be reserved from each payment until half the work under the contract, as estimated by the engineer, has been completed, after which there shall be no further reservation. The reserve percentage will be paid upon the satisfactory completion and final acceptance of the work." (R. p. 8)

Paragraphs 14 and 21 of the general specifications, which were a part of the first contract, relate to the time of commencement and rate of progress. They read as follows:

> "14. The contractor will be required * * * to prosecute said work with faithfulness and energy in accordance with paragraph 21, (R. p. 8)
>
> * * * * * * * *
>
> "21. *Rate of work and date of completion.* Work must be commenced and prosecuted as provided in paragraph 14. No work will be required in the months of December, January and February, but it may be continued in these months if the contractor so desires. The rate of work will be at least 50,000 cubic yards per

month, unless otherwise authorized by the engineer. If at any time after the date fixed for beginning the work it shall be found that the operations are not being carried on as rapidly as required by the contract, the engineer shall have power, after due notice in writing to the contractor, to employ such additional plant and labor, or to purchase such material as may be necessary to insure the proper completion of the work within the time specified, and the excess of cost thereof over what the work would have cost at the contract rate shall be a charge against any payments due or to become due to the contractor. This provision, however, shall not be construed to affect the right of the United States to annul the contract." (R. p. 11.)

In paragraph 4 of the contract is found the following provision:

"4. If, in any event, the party of the second part * * * shall in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part, and upon the giving of such notice all payments to the party or parties of the second part under this contract shall cease, and all money and reserved percentage due or to become due the said party or parties of the second part, by reason of this contract, shall be retained by the party of the first part until the final completion and acceptance of the work herein stipulated to be done; and the United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid to the party of the second part for completing the same, and also all costs of inspection and superintendence incurred by the said United States, in excess of those

payable by the United States during the period herein allowed for the completion of the contract by the party of the second part; and the party of the first part may deduct all the above-mentioned sums out of or from the money or reserved percentage as aforesaid; and upon the giving of the said notice the party of the first part shall be authorized to proceed to secure the performance of the work or delivery of the materials, by contract or otherwise in accordance with law." (R. p. 4)

The contractor commenced work under the contract on August 28, 1907, within the required time, and on March 14, 1913, it had dredged and removed from the specified channel 3,153,632 cubic yards of material, for which it was paid $478,467.05, and defendant had retained $33,998.15, in accordance with the terms of the contract.

It was for the recovery of the sum of $33,998.15, the amount of the retained percentage, that this action was instituted.

CONTRACTOR'S APPLICATION TO SECRETARY OF WAR TO BE HEARD ON QUESTION OF TERMINATION OF CONTRACT.

On November 1, 1912, the contractor wrote to the Secretary of War requesting to be heard on the question of the termination of the two contracts, (R. p. 22). The summary of said letter is as follows:

"We respectfully submit in support of our position that the contract should be terminated—

"1. Because the difference in cost between excavating and depositing material shown by the borings, and the excavation and depositing of clay, bowlders, and other hard materials actually found, is so materially different and excessive in cost as to be inequitable and unjust, and to require the excavation and disposal of a mass of material not within the terms of the specification at the price bid for the former imposes a burden upon the contractor that is inequitable and unjust.

"2. The bid of this company was justifiably based upon erroneous information and data furnished by the Engineering Department.

"3. For reasons given the contract should be discontinued and terminated, all percentages retained should be paid to the contractor, and this contractor released from all liability thereunder.

"4. The work should be readvertised on correct information without prejudice to this contractor.

"*We respectfully request that we be given an opportunity to be heard in this matter and to submit, if you should deem it advisable, evidence to support the contentions urged above.* (Emphasis ours.)

"We further request that the United States Engineer office at the city of New York be advised of this application; that a consideration thereof is pending in your office; and that pending this consideration no further action may be taken by him prejudicial to this contractor." (Rec. p. 22.)

Without giving the contractor an opportunity to be heard on the question of terminating the contracts, the Engineers Office, on February 8, 1913, wrote as follows:

"Referring to progress of work upon your contract dated August 12, 1907, for dredging in Newark Bay and Passaic River, N. J., and to the decision of the department upon your application dated November 1, 1912, for cancellation of that contract, I have to say that you should resume dredging at the earliest possible date, and not later than March 1, 1913, and prosecute the work with faithfulness and energy in accordance with the contract. The entire cessation of the work is not contemplated under the contract, *although you have attained the required average rate of progress to date upon same.* (Emphasis ours.)

"Please advise me of your plans and the date for resuming work, so that the necessary arrangements for inspection by this office may be made." (Rec. p. 23)

On February 21, 1913, the Engineer again wrote appellant as follows:

"Referring to my letter of the 8th instant in reference to work upon the contract of the Midland Land and Improvement Company, dated August 12, 1907, for dredging in Newark Bay and Passaic River, N. J., please advise me when I may expect a reply." (Rec. p. 23.)

To this letter the contractor's treasurer replied, on February 28, 1913, as follows:

"Replying to your esteemed favors of February 8th and 21st, in reference to work upon the contract of the Midland Land and Improvement Company dated August 12, 1907, for dredging in Newark Bay and Passaic River N. J., we respectfully refer you to our previous correspondence on this subject, wherein we have informed you of our intention to discontinue work on this contract for reasons therein specified.

"Under advice of our attorneys, we have not changed our position in the matter." (Rec. p. 23.)

On March 4, 1913, the engineer in charge of the work wrote to the Chief of Engineers as follows (R. p. 23):

"1. Referred.

"2. In pursuance of the advice of the department as contained in paragraph 6 of the 1st indorsement, office of the Chief of Engineers, dated February 3, 1913, on my letter dated January 15, 1913 (E. C. 63777/52, in reference to progress of work on the contract of the Midland Land and Improvement Company dated August 12, 1907, for dredging in Newark Bay and Passaic River, N. J., there are inclosed here with copies of letters from this office to the contractor dated February 8 and 21, 1913, in reference to this work. *It appears from paragraph 4 of the department letter above referred to that the contractor will not be in default until July 29, 1913, if the required rate of work, 50,000 cubic yards per month, is used as the required amount of work to be accomplished up to that date.* (Emphasis ours.)

"3. In view of the information now received from the company, advice is requested as to the propriety of

annulling this contract at this time. So far as the practical consideration of this contract, the contractor abandoned work on September 24, 1912, as referred to in my report dated December 13, 1912 (E. D. 63777-40)." (Rec. pp. 23-24.)

The Chief of Engineers replied as follows:

"1. Since the contractor has definitely abandoned the contract, as evidenced by letter of the 28th ultimo, the contract should be at once annulled by giving notice to that effect to the contractor and the sureties, preserving evidence of the receipt of such notices. The fact and date of annulment should be reported hereon in returning this paper.

"2. After annulment of the contract recommendation as to the method of completing the work, or other course to be followed, should be submitted." (Rec. p. 24)

On March 14, 1913, the engineer in charge advised the contractor that the two contracts had been annulled. Said letter reads as follows:

"Referring to your letter of February 28, 1913, in which you have definitely informed me that you have discontinued work on your contract for dredging in Newark Bay and Passaic River, N. J., dated August 12, 1907, I have to inform you that this contract, with its supplementary contract dated August 3, 1911, is hereby annulled, with the sanction of the Chief of Engineers, and that arrangements will be made to secure the performance of the uncompleted work in accordance with paragraph 4 of the contract." (Rec. p. 24.)

The work covered by the contracts, having been taken out of the hands of the contractor, the defendant entered into a contract with one Eugene Breyman, who removed from the area of the channel covered by the first contract, 1,328,257 cubic yards of material at the price of 26 7/8c per yard, and for the total sum of $356,969.07. No material

was removed by Breyman from the area covered by the second contract; his work being limited to the area covered by the first contract only.

ASSIGNMENTS OF ERROR.

The Court of Claims erred:

FIRST: In not holding that up to the time the defendant annulled the contracts and took the work out of the contractor's hands, the contractor had removed a greater quantity of material than was required by the contracts.

SECOND: In holding that the letters of the contractor dated November 1, 1912, and February 28, 1913, constituted a renunciation by the contractor of the obligations of the contract, and in holding that the annulment of the contract by the defendant upon the statements contained in these two letters was justified and legal.

THIRD: In not holding that it was incumbent upon the defendant to show that the uncompleted part of the work covered by the contractor's contracts had been completed under a contract and specifications which did not materially differ or substantially depart from the old contract and further in not holding that defendant had failed to show that the uncompleted part of the work had been so completed.

FOURTH: In failing to hold as a conclusion of law, that the contractor was entitled to recover of defendant the sum of $33,998.15.

FIFTH: In entering a judgment dismissing the petition of the contractor.

ARGUMENT.

I.

RATE OF PROGRESS.

It is contended upon the part of the contractor that at the time the defendant annulled the contracts, thereby making it impossible for the contractor to carry on the work under the contracts to completion, the contractor was not in default in the matter of the quantity of material required by the contracts to be removed previous to that date, and that the contractor had not renounced its obligations under said contracts.

The Court will observe that paragraph 21 of the specifications, heretofore set out in full, provides that the rate of work will be at least 50,000 cubic yards per month, for nine months of the year, unless otherwise authorized by the engineer. (R. p. 11.) No work was required for December, January and February.

The reasonable construction of the expression, "The rate of work will be at least 50,000 cubic yards per month", is that material should be removed at the average rate of 50,000 cubic yards per month. Any other construction would clearly result in an absurdity.

But the parties to the contract did, during the progress of the work, construe the language to mean, "at the average rate of 50,000 cubic yards per month."

On this point the attention of the Court is invited to certain letters referred to above, and which are set out in the findings of fact.

On February 8, 1913, the Engineer's office, in writing to the contractor, said:

> "The entire cessation of work is not contemplated under the contract, *although you have attained the required average rate of progress to date upon same.*" (Italics ours.) (R. p. 23.)

And on March 4, 1913, the Engineer in charge of the work, advised the Chief of Engineers that;

> "It appears from paragraph 4 of the department letter above referred to that *the contractor will not be in default until July 29, 1913, if the required rate of work, 50,000 cubic yards per month, is used as the required amount of work to be accomplished up to that date.*" (Italics ours.) (R. p. 24)

The Courts have uniformly held that, where the parties to a contract have adopted a construction of the same, and have proceeded to carry out the requirements of the contract in accordance therewith, then such a construction will be upheld by the Court. This rule has been followed by this court in the following cases: District of Columbia vs. Gallaher, 124 U. S. 505; Chicago vs. Sheldon, 9 Wall. 50, 54; Tysliff vs. Tysliff, 122 U. S., 121, 131.

It is, therefore submitted that the contract when read as a whole, only required that the contractor should remove material at the average rate of 50,000 cubic yards per month for nine months of the year. If, however, there is any doubt about such being the meaning, then the parties have so construed the same, and such a construction will be followed.

II.

WORK PROSECUTED WITH FAITHFULNESS AND ENERGY.

It appears from the findings of facts that at the time the contracts were annulled by the defendant, the contractor had exceeded by a large amount the average rate of 50,000 cubic yards per month. The contracts were annulled on the 14th day of March, 1913, and according to the letter of the engineer in charge to the Chief of Engineers, of March 4, 1913, there would have been no default in quantity of material to be dredged, without further dredging in the meantime, until July 29, 1913. (Finding No. IX, Rec. pp. 23, 24.)

In arriving at this date of July 29, 1913, when the contractor would be in default, the engineer estimated that if the contractor undertook to do any dredging at all during the months of December, January and February, the three exempted months, then it should be charged with the full rate of 50,000 cubic yards per month regardless of the small amount dredged in that particular month. Applying this harsh rule the contractor was at the time of the annulment, four and one-half months ahead of the requirements.

It is respectfully submitted that if the contractor took the chances of dredging during the exempted months of December, January and February, then the yardage dredged during these months should have been credited to the contractor on the amount of yardage required for the nine dredging months. Applying this rule, the contractor at the time of the annulment, was ahead of the requirements of the contract by *fourteen and one-half months with an excess in material of about 725,000 cubic yards.*

The contract, in paragraph 4 (Rec. p. 4), has the following provision:

> "If, in any event, the party of the second part * * * shall in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annual this contract * * *."

The Court will observe that the expression "faithfulness and energy" means, and contemplated nothing more, than the fulfillment of the requirement of paragraph 21 of the specifications relative to the rate of progress. No greater rate of progress could have been required than the average rate of 50,000 cubic yards per month, and if such a rate was maintained by the contractor, then it was not possible to charge a lack of "faithfulness and energy." Any other construction of the meaning would render the requirement

to dredge at the average rate of 50,000 cubic yards per month meaningless, and without significance in fixing the obligations of the contractor.

If there is any doubt of the meaning and significance of the expression "faithfulness and energy," then we invite the attention of the Court to the following language of paragraph 21:

> "If at any time after the date fixed for beginning the work it shall be found that operations are not being carried on as rapidly as required by the contract, the engineer shall have power, after due notice in writing to the contractor, to employ such additional plant and labor, or to purchase such material as may be necessary to insure the proper completion of the work within the time specified." (R. p. 11.)

Under the provision of the specifications just quoted, no additional plant could be put upon the work by the defendant unless the work was not being carried on as repidly as specified by the contract, and then only to insure the completion of the work within the time required at 50,000 cubic yards per month for nine months per year.

Furthermore, said provision makes it very plain that the contractor will not be in default if materials are removed, at the rate of 50,000 cubic yards per month, for nine months per year, and that if materials are removed at such rate, then the contractor will have proceeded with faithfulness and energy.

On this point, therefore, the conclusion must be that the contractor did fulfill the provision of the contract with reference to the rate of work, and that an annullment of the contract by defendant was not justified on that account.

III.

THE CONTRACTOR DID NOT BREACH THE CONTRACT BY A REPUDIATION THEREOF.

The Court will observe from the correspondence which is set out in the findings of fact (R. p. 22) and also in the statement of the case herein, that defendant did not annul the contract on account of the failure of the contractor to maintain the average rate of 50,000 cubic yards per month as was required, but, because of the contractor's letter of February 28, 1913 (R. p. 24).

The contractor maintains that its suspension of dredging was temporary and not a breach of the contract; that it had a right under the terms of the contract to operate its dredging plant on each day in the month or every other day in the month, or every month in the year, or every other month in the year, just as long as the average rate was maintained. That this contention is correct has never been controverted by the defendant.

NO REPUDIATION OF CONTRACT IN LAW.

Whether there has been a repudiation of the obligations of a contract when the performance is not yet due, thereby creating an anticipatory breach thereof, is a question of law. On behalf of the contractor it is contended that from the facts found by the Court of Claims, there was not in law a repudiation of the contract and an anticipatory breach thereof.

The renunciation of the obligations of the contract by the contractor appears, if at all, either in a letter of the contractor addressed to the Secretary of War, dated November 1, 1912, wherein a request was made for a hearing on the question of a termination of the contract, or in the letter of February 28, 1913, of the Treasurer of the contractor to William T. Rossell, Colonel. The Engineer in charge said it was solely on the letter of February 28, 1913. He said:

"Referring to your letter of February 28, 1913, in which you have definitely informed me that you have discontinued work on your contract * * * I have to inform you that this contract, with its supplemental contract, dated August 3, 1911, is hereby annulled." (R. p. 21.)

The Court, in finding IX (R. p. 22) said:

"November 1, 1912, the plaintiff wrote to the Secretary of War requesting the cancellation of the two contracts."

Nowhere in the record, and nowhere in the evidence given in the court's finding is it shown that the contractor requested "the cancellation of the two contracts." What the contractor did do, was to make APPLICATION to the Secretary of War TO BE HEARD on the question of whether the contract should be terminated and discontinued. (Finding IX, R. p. 22.)

In the immediately succeeding paragraph the Court quotes from the contractor's application:

"We respectfully submit in support of our position that the contract should be terminated * * *. For reasons given the contract should be discontinued and terminated. * * *

"We respectfully request that we be given an opportunity to be heard in this matter * * *.

"We further request that the U. S. Engineer Office in the city of New York be advised of this application; that a consideration thereof is pending in your office, and that pending this consideration no further action may be taken by him prejudicial to this contract." (Finding IX, R. pp. 22-3.)

On February 28, 1913, the contractor, after acknowledging the receipt of the two letters from the defendant's engineer in charge of the work, wrote:

"We respectfully refer you to our previous correspondence on this subject, wherein we have informed

you of our intention to discontinue work on this contract for reasons therein specified.

"Under advice of our attorneys we have not changed our position in the matter." (Finding IX, R. p. 23.)

Change what position? Their application to the Secretary of War to be heard on the question as to whether the contract should be terminated. They had not been heard, and their intention to discontinue work pending this application to be heard had not been changed. Through that entire application the contractor stated that the contract "should be terminated," or "should be discontinued." Never once that it had determined to discontinue the work permanently or to terminate the contract.

There can be no question that defendant's engineer in charge so interpreted this application of November 1, 1912 (R. p. 22) for as late as February, 1913, the engineer in charge wrote the contractor directing that work be resumed not later than March 1, and said:

"Please advise me of your plans and the date for resuming work, so that the necessary arrangements for inspection by this office can be made." (R. p. 23.)

This clearly indicates that the engineer in charge did not construe the application of November 1, 1912, to be a renunciation of the contract, but actually expected the contractor to begin work in a very short while. And on February 21st this request was renewed. (R. p. 23.)

According to this, not until after the receipt of the letter from the contractor's treasurer of February 28, 1913, did the engineer in charge of the work assume to decide that the contractor had renounced the contract.

SIGNIFICANCE OF APPLICATION.

Application to be heard on the question of the termination of the contract implies that the termination had not

at that time been definitely determined upon, and that it would come through the consent of the parties.

The Court completely lost sight of the significance of this application addressed to the Secretary of War to be heard on a most vital and important matter. Of course, in the application the questions upon which the contractor desired to be heard had to be stated, and this was done in a general way, and a request made for an opportunity to present the evidence in support of the contractor's contention. This contention being;

> "1. Because the difference in cost between excavating and depositing material shown by the borings, and the excavation and depositing of clay, bolders, and other hard materials actually found, is so materially different and excessive in cost as to be inequitable and unjust, and to require the excavation and disposal of a mass of material not within the terms of the specification * * *.
>
> "2. The bid of this company was justifiably based upon erroneous information and data furnished by the Engineering Department." (R. p. 22.)

The Court had much difficulty in overcoming the evidence which was adduced at the trial in support of the contractor's contention. In the course of its labors the court shows that at least $135,000 had been spent in repairs to the plant (Finding VI, R. p. 21), and that at the time of the suspension and when the application to be heard was made, "the plant had been gradually running down until at the time the work stopped it was inadequate to perform the contract." (Finding VIII, R. p. 22). In its opinion the Court says:

> "The borings in this stretch of 2.2 miles show 'mud, mud and sand, mud and shells, sand and gravel,' and yet the ten-day reports exhibit a strata of clay along the entire area. Clay is shown along with the the above materials, in some instances hard enough

to put the pumps of the plaintiff out of commission." (R. p. 29.)

It will be noted that the court here says that the borings in this stretch of 2.2 miles show mud, mud and sand, mud and shells, and sand and gravel; and on R. p. 27, the Court quotes from the specifications as follows:

> "*Character of material.* The material to be excavated is believed to be mud, sand and gravel. * * *."

Further on the Court, in its opinion, says:

> "And yet the ten-day reports exhibit a strata of clay along the entire area. Clay is shown along with the above materials in some instances hard enough to put the pumps of plaintiff out of commission." (R. p. 29.)

These ten-day reports were made by defendant's engineer showing the character and the amount of material as the dredging was done.

Under these circumstances the contractor temporarily suspended work shortly before the beginning of the three months during which it was exempt by the terms of the contract from work at all.

Now let us see what happened. The contractor without having an opportunity to be heard, was, some time before the expiration of the exempt period, directed by the engineer in charge of the work to "resume dredging at the earliest possible date." (R. p. 23.)

A few days thereafter, the engineer in charge asked for a reply to this communication, to which the Treasurer of the plaintiff replied:

> "We respectfully refer you to our previous correspondence on this subject, wherein we have informed you of our intention to discontinue work on this contract for reasons therein specified." (R. p. 23)

This prior communication was the above application to the Secretary of War to be heard. Thereupon, and on

March 4, 1913, the engineer in charge referred the matter to the Chief of Engineers, and enclosed copies of his above letters of February 8th and 21st, 1913, to the Contractor but significantly omitted this letter of February 28, 1913, from Contractor's treasurer and said:

> "3. In view of the information now received from the company, advice is requested as to the propriety of annulling this contract at this time." (R. p. 24.)

In this communication the engineer in charge further stated:

> "It appears from paragraph 4 of the department letter above referred to, that the contractor will not be in default until July 29, 1913, if the required rate of work, 50,000 cubic yards per month, is used as the required amount of work to be accomplished up to that date." (R. p. 24.)

On March 14, 1913, the engineer in charge wrote plaintiff:

> "Sirs: Referring to your letter of February 28, 1913, in which you have definitely informed me that you have discontinued work on your contract * * * I have to inform you that this contract * * * is hereby annulled with the sanction of the Chief of Engineers." (Finding IX, R. p. 24.)

Could there be anything more arbitrary? According to the decision of the Court, the contractor, after having had its plant put out of commission through dredging materials not provided for in the specifications or shown in the borings made application to the Secretary of War to be heard on the question and without ever having been given an opportunity to be heard, the contractor, during the exempt period, is directed to begin work at once. In a short time thereafter it is asked for a reply to this communication; to which contractor's treasurer replies that the contractor

had not changed its intention to discontinue work, as appears in its application to be heard, which latter shows on its face that only a temporary discontinuance is contemplated. Without further explanation from the contractor, this announcement, that there had been no change in the contractor's attitude from that expressed in its application to be heard, the cotnract is on March 14, 1913, summarily annulled, although the Department had itself found that "The contractor will not be in default until July 29, 1913." (R. p. 24.)

Does not this action violate one of the most fundamental and sacred principles of Anglo-Saxon jurisprudence, that one accused of wrongdoing ought not to be condemned without having been given an opportunity to be heard? It would be no more flagrant violation of this principle if one who had been charged with criminal wrongdoing should be tried and condemned without having been given an opportunity to be heard, than was done in the instant case.

It is significant that the defendant made no complaint or protest about the rate of progress or any so-called default until some time after the contractor had charged, on November 1, 1912, in its application to the Secretary of War to be heard, that it had been misled by the misrepresentations made through the office of the engineer in charge as to the character of the material to be dredged. The contractor having been guilty of *lese majesty* in making this charge, from this time on as the record shows the engineer in charge took every advantage of the slightest pretext to get the contract annulled without the contractor having had an opportunity to be heard on this charge regarding the misrepresentation made through the office of the engineer as to the character of the material. This was worked so cleverly the Court was misled into omitting all reference to the evidence which showed that after the temporary discontinuance of the work by the contractor on September 24, 1912, the plant was being repaired to resume work, and and was further misled into making the very inconsistent statement in Finding VII (R. p. 21), that:

> "After January 1, 1910, the work was carried on spasmodically and the plaintiff was in default nearly every month up to September 24, 1912."

Yet the Court shows that more than one and one-half years after this date of January 1, 1910, namely, on August 10, 1911, the defendant entered into a supplemental contract with the contractor to widen the channel provided for in the first contract.

In this supplemental contract of August 10, 1911, this significant language is used:

> "And whereas it is found advantageous and in the best interest of the United States to modify the said contract as hereinafter specified, for the following reasons." (R. p. 15.)

From this it would seem that the defendant did not at that time, at least, take very seriously this so-called default nearly every month, as expressed by the court at record, page 21.

RENUNCIATION MUST AMOUNT TO A CLEAR AND DISTINCT REPUDIATION.

The principle is well settled that the renunciation must amount to a clear and distinct repudiation of the obligations under the contract. There must be a positive declaration of a fixed purpose not to perform the contract. (Elliott on Contracts, Sec. 2032, Vol. 3, p. 11.)

This Court, in Dingley v. Oler, 117 U. S., 503, said:

> "In Smoot's case, 15 Wall. 36, this court quoted with approval the qualifications stated by Benjamin on Sales: 'Mere assertion that the party will be unable or refuse to perform the contract is not sufficient. It must be a distinct, unequivocal, absolute refusal to perform the promise, and must be treated and acted upon as such by the other party.' "

The Court cites with approval the case of Avery v. Bowden, the facts of which are given in the Smoot case, 15 Wall. 36, as follows:

> "Avery v. Bowden, in the Court of the Exchequer, affirmed in the Exchequer Chamber, is very much to the point. It was an action arising out of a charter party, one of the covenants in which was that the vessel should be at Odessa, and lay there forty days within which time the shipper was to furnish her cargo, unless war should soon be declared between Russia and Great Britain. The vessel came to Odessa on the 11th of March, and sailed away in ballast on the 17th of April. It was proved that at four different times during this period the officers of the ship applied to the charterer for cargo, who said, 'We have none for you,' and at last said,' 'I have no cargo for you; you had better go away.'
>
> "On this testimony a verdict was taken for the plaintiff, the shipowner, subject to the judgment of the court on the law of the case. The judges both in the Exchequer Court and in the Exchequer Chamber, were unanimous in the opinion that this conduct of the agent did not relieve the plaintiff from the obligation to remain the forty days, and that on that account he could not recover."

This is a sound rule, and should not be departed from. If it is departed from, it will inevitably lead to great confusion.

The Court will note that in all cases where a contract is held to be breached before performance, due through a renunciation of the obligations thereof, it has not only been held that such renunciation must be in unequivocal words —that is to say, words which are plain and without doubtful meaning—but also that the other party must accept the words as being the final expression on the subject, for if he afterwards requests performance, then such party does not consider the contract to be at an end, and there is no anticipatory breach thereof.

In the instant case, the last word of the contractor claimed by defendant to indicate the contractor's invention to repudiate the contract is found in the letter of November 1, 1912, in which there is a request for a termination. We find the defendant inquired twice many months thereafter, namely in February, of the contractor when operations would be commenced, and in one on February 8, 1913, said:

> "Please advise me of your plans and the date for resuming work, so that the necessary arrangements for inspection by this office may be made." (R. p. 23.)

It is very plain, therefore, that the defendant did not consider the letter of November 1, 1912, as a renunciation of the contract on the part of the contractor and did not treat it as a renunciation. So, then, if the letter of November 1, 1912, was not a renunciation of the contract, the letter of February 28, 1913, could not constitute a renunciation thereof, for the reason that it was intended merely to refer to the letter of November 1, 1912, and contained no statement relative to the intention of the contractor changing or modifying the attitude of the contractor as expressed in the letter of November 1, 1912.

IV.

INCONSISTENCIES IN THE COURT'S FINDINGS AND OPINION.

Implicit reliance is placed in the fact that this Court will sustain the contention that the lower Court erred as above pointed out. However, it may be interesting to note some of the inconsistencies contained in the lower Court's findings of fact and opinion, which should of themselves be sufficient reason for reversal.

This Court has held that in order to entitle the defendant to keep the retained percentages, it is incumbent upon it to show that the uncompleted work was done by another

contractor under a CONTRACT and specifications which did not materially or substantially depart from the old CONTRACT and specifications. (Axman's case, 234 U. S., 36; 58 L. ed., 1198; O'Brien's case, 220 U. S., 321.)

Thus it is well settled that the defendant's defense to the payment of retained percentages is an affirmative one.

In the instant case, the defendant never showed that the uncompleted part of the work was done by another contractor under a CONTRACT and specifications which did not materially and substantially depart from the old CONTRACT and specifications, and the defendant never seriously attempted to show this, for the very palpable reason that it could not.

The record at page 17 shows that,

> "No demurrer, plea, answer, counterclaim, setoff, claim of damages, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by rule 34."

Furthermore, the record is MOST SIGNIFICANTLY DEFICIENT of any copy of any contract and specifications under which the uncompleted work was done by another contractor, although copies of the contractor's contract and specifications are given in full. As explanation of this it should be stated that the contractor's counsel, when taking testimony, disclosed that the new contract and specifications with Breyman which had been incidentally claimed in a general way covered the uncompleted work, were in existence, and in Defendant's possession. The contractor's counsel then made a number of efforts to have copies of this contract and specifications introduced in evidence for the purpose of comparison, and as the best evidence on the question, to which defendant's counsel strenuously objected, with success.

UNCOMPLETED WORK NOT SHOWN TO HAVE BEEN COMPLETED UNDER CONTRACT WHICH DID NOT MATERIALLY DEPART FROM THE OLD CONTRACT.

The Court not only erred in not holding that it was incumbent upon the defendant to show that the work was completed under a contract which did not materially or substantially depart from the old contract, but the record utterly fails to show that the work was completed under a CONTRACT which did not materially depart from the old CONTRACT.

It is true that the Court, in Findling XI, R. p. 25, said:

> "After the work was abandoned by the plaintiff and the two contracts cancelled as described in Finding IX, the uncompleted part of the work was advertised August 16, 1913, on the same SPECIFICATIONS, SURVEYS AND BORINGS, and was awarded to Eugene Breyman at 26 7/8c per cubic yard, scow measurement, contract dated August 10, 1913, who completed the work." (Emphasis ours.)

It will be observed that the Court said that,

> "The uncompleted part of the work was advertised August 10, 1913, on the same SPECIFICATIONS, SURVEYS AND BORINGS, and awarded to Eugene Breyman." (Emphasis ours.)

Not once does it say that the work was awarded or completed under a CONTRACT which was the same or did not materially or substantially depart from the old contract. It is one thing to advertise on the same specifications, surveys and borings, and an entirely different thing to enter into a contract upon the same terms as the old contract.

It is significant that the Court omits saying the all essential and vital thing that the CONTRACT under which the work was awarded and completed, was the same, or even similar to the old contract, and that there was no ma-

terial or substantial difference between the two. The reason for this is very simple, it being that there was no evidence in the record upon which the Court could base any such finding or any such statement in its opinion.

This is further shown by the figures given by the Court in its Findings.

Finding II, R. p. 18, shows that the contractor's contracts called for dredging the following amounts:

Original contract	4,177,110	cu. yds.
Supplemental contract, 10%	417,711	cu. yds.
Making a total requirement of	4,594,821	cu. yds.
Finding VII, R. p. 22, Shows that contractor dredged under the two contracts	3,153,632	cu. yds.
Leaving a balance to be dredged of	1,441,189	cu. yds.
Finding XI, R. p. 25, shows that Breyman dredged a total of	1,328,257	cu. yds.
Making a difference of	112,932	cu. yds.

which itself shows a material variation.

Furthermore, the Court does not say to what "The same specifications, etc.," refers. A careful reading of this finding will disclose that the particular thing the court had in mind in this finding was to show how much had been dredged by the new contractor, and what the defendant lost by not having been able to get the work completed at the price the contractor had received. In the first sentence, the finding states that the work had been let to a new contractor, and gives the price; and in the next sentence it gives the amount the new contractor dredged, and the cost thereof to the defendant, and what it would have cost if the contractor had completed its contract, and the difference in cost of $141,127.31.

The Court says:

> "After the contract was abandoned by the plaintiff and the two contracts cancelled as described in Finding IX the uncompleted part of the work was adveritsed August 16, 1913, on the same specifications, surveys and borings." (R. p. 25.)

To what does "specifications, etc.," refer? Does it refer to the first contract, or to the second? It could not have referred to both contracts, as their specifications were different, and were for dredging different areas.

If the court had been attempting to apply the rule announced by this Court, that the Government must show that the work was done by another contractor under a contract and specifications which did not materially differ or substantially depart from the old contract and specifications (Axman's case, 234 U. S., 36), it certainly would have used more definite and specific language.

This would seem clear when considered in connection with the very material variance between the work to be done under the old contract and the work shown by the findings to have been done under the new contract.

Finally, where does the court get its authority for stating that the uncompleted part of the work was advertised August 16, 1913, on the same specifications, surveys and borings? (Finding XI, R. p. 25.)

When the contract was annulled there remained a certain, definite number of cubic yards to be dredged. An examination of the specifications for the Breyman contract will show that they nowhere provided for any definite number of yards to be dredged, but provide that the quantity of material to be removed under the contract will depend upon the price bid.

COURT MISLEAD REGARDING THE LOCATION OF THE DUMPING PLCE AS AFFECTING THE CONTRACTOR'S REASONS FOR DISCONTINUING WORK.

After stating in its opinion that the work had been done in a most expeditious manner up to the time of the discontinuance (R. p. 29), the court says:

> "It was not until the plaintiff company had completed fully, or very nearly so, two-thirds of the work, that complaint was made, over five years after it had begun work, and at a time when it became more expensive to operate because so far from a dumping base."

The Court was misled on this question of the distance from the dumping base, but lays great stress on it as being the real reason for the contractor's discontinuing the work.

That the Court was decidedly misled is disclosed by the record. The area to be dredged was 10.8 miles long (contract, R. p. 10). The contractor began dredging at the lower end of the work and progressed upstream (Finding VII, R. p. 21) and completed the dredging for the full width for a distance of 6.3 miles, 5.3 miles being on the part shown on sheets one and two, and one mile being on the part shown on sheet No. 3 (R. p. 21). The contractor then proceeded dredging on up the Passaic River for a distance of 2.2 miles additional at about half of the required width. (R. p. 21.) Thus the contractor had dredged for a distance of 8.5 miles out of the required 10.8 miles. So it appears that the distance from the dumping base for the uncompleted part was not very material.

This finding VII (R. p. 21) does most conclusively bear out the contractor's contention that as the dredging progressed up the Passaic River, the proportion of the hard material very greatly increased, thus making the material much more difficult to pump. Furthermore it is a matter of common knowledge that the proportion of rock, clay and other

hard materials almost invariably increases in proceeding upstream from the mouth, as in this instance.

THE COURT WAS GREATLY IMPRESSED WITH THE ENORMOUS INCREASE IN THE VALUE OF THE LAND AS A RESULT OF FILLING IN AND OF THE WAR.

In Finding X, R. p. 24, the Court makes a very remarkable statement, as follows:

> "The distance plaintiff would have been compelled to transport this material to sea if it had not had the dumping ground on ITS OWN PROPERTY, the Newark Meadows * * *. The evidence does not show how much of PLAINTIFF'S SWAMP LAND was filled in by this contract, but does indicate that a considerable part of the 3,500 acres was thus reclaimed. * * * The value of the land after filling in was increased $12,000 per acre over its value prior thereto, or a total increase for the 3,500 acres of $42,000,000." (R. pp. 24-5.) (Emphasis ours.)

That this finding containing the very immaterial statement regarding the increase in the price of the land upon which the material was dumped should have been without preceding or subsequent connection, thrown in, among the other findings, and containing another statement which is flatly contradicted by another finding, is astonishing.

At the top of page 29 of the record, the court in its opinion, said:

> "As a matter of fact, proven and not seriously disputed, the enterprise as a whole resulted in immense profits, as shown in Finding X, notwithstanding the dredging contract was performed to the date of abandonment at a serious loss. * * * It is a most potent factor in the determination of the issue as to being misled by the representations of the Government."

It is true that the plaintiff offered no evidence to dispute this immaterial fact that the price of the land upon which

the material was dumped was greatly increased by the dumping, and the World War, to which the Court refers in another part of its opinion, as it was thought that the increase in the price of land and the effects of the World War were wholly immaterial to the determination of this issue. Yet it seems the court considered it to be "a most potent factor."

If such matters were to be gone into, it could have been shown that the bids, other than the contractor's, for doing the entire work ran "from 22.2c to 36.44c per cubic yard" (Finding V, R. p. 20), making a difference between the lowest bid and what the contractor received for doing the work of 5.95c per cubic yard, or a saving to the defendant on the work done by the contractor of $187,641.10, but with the result that the contractor's magnificent plant had been put out of commission, in dredging material not provided for in the specifications (Finding VII, R. p. 22, and opinion, R. p. 29), and according to the Court's finding (R. p. 22) sold for $1,000.00, and that $135,000.00 had been spent "on repairs to the dredging plant." (R. p. 21.)

THE EFFECT OF THE INCREASE IN THE VALUE OF THE LAND UPON THE COURT'S FINDING AND OPINION SHOWN IN THE CONFUSION REGARDING THE OWNERSHIP OF THE LAND AND THE CONTRADICTORY STATEMENTS IN THE FINDINGS AND OPINION CONCERNING THIS OWNERSHIP.

As indicating something of the inconsistencies of the findings and opinion in this case, the Court's attention is invited to the statement of the lower Court in the disconnected Finding X, R. p. 24, as follows:

> "The distance plaintiff would have been compelled to transport this material to sea if it had not had the dumping ground on ITS OWN PROPERTY, the Newark Meadows * * *. The evidence does not show how

much of PLAINTIFF'S SWAMP LAND was filled in by this contract, but does indicate that a considerable part of the 3,500 acres was thus reclaimed. * * * The value of the land after filling in was increased $12,000 per acre over its value prior thereto or a total increase for the 3,500 acres of $42,000,000." (R. pp. 24-5.) (Emphasis ours.)

It will be observed that all through this Finding X (R. p. 24), the Court refers to this so-called $42,000,000 worth of property as being the contractor's "*own property.*" Yet in Finding VI, R. p. 21, the Court said:

"Finally, Harvey Fisk & Sons foreclosed its lien on the dredging plant and Newark meadows and bought in the whole property. They then separated the land from the dredging operations and formed two companies, the Newark Meadows Improvement Company and the Midland Land and Improvement Company, and John A. Seeley became manager of the dredging Company." (R. p. 21.)

Still in another finding (VIII, R. p. 22) the Court said:

"Several months prior to that date (September 24, 1912), all of the stock in the dredging plant, including the retained percentage, was sold to one Frank A. Barnaby for one thousand dollars. The work continued, however, until September 24, 1912, in the name of said company under the management of John A. Seeley." (R. p. 22.)

And in another finding (XII, R. p. 25) the Court said:

"The charter of the company was forfeited for nonpayment of taxes."

A rather absurd situation for a corporation which the Court in another finding said owned property valued at $42,000,000.

So it appears from a careful examination of the findings and opinion of the Court that in order to support one theory the findings show that there were two separate and distinct companies or legal entities, to which it was referring, and that these two companies owned separate and distinct properties—one the land which was being filled in, and the other the dredging plant; and in support of another theory that the contractor owned all of the property of the two companies, including the dredging plant and the $42,000,000 worth of real estate besides; and in support of another theory that the contractor was a pauper, having sold all of its stock for $1,000.00, and having had its charter forfeited for non-payment of taxes.

It is most unfortunate that this Court could not have the evidence before it upon which these conflicting statements are based.

It is respectfully submitted that an explanation of these inconsistencies may be found in the fact that the Court was very much overworked and quite tired at the time these findings and this opinion were written.

CONCLUSION.

FIRST: It is respectfully submitted that the Court erred in holding that the contractor was in default in the performance of the contracts.

SECOND: It is submitted that the Court erred in holding that the contractor repudiated its obligations under said contracts, thereby creating an anticipatory breach thereof.

THIRD: It is submitted that the Court erred in not holding that it was incumbent upon the defendant to show that the uncompleted part of the work had been completed under a contract and specifications which did not materially or substantially depart from the old contract, and in not holding that defendant had failed to show that the uncompleted part of the work had been so completed.

FOURTH: It is submitted that the Court erred in its failure to award a judgment in favor of the contractor in the sum of $33,998.17, and in dismissing the petition.

C. C. CALHOUN,
Attorney for Appellant.

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IN THE

Supreme Court of the United States

October Term, 1925.

No. 105.

MIDLAND LAND AND IMPROVEMENT, COMPANY, *Appellant*,
vs.
THE UNITED STATES, *Appellee*.

REPLY BRIEF FOR THE CONTRACTOR, THE APPELLANT.

C. C. CALHOUN,
Attorney for Appellant.

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OPINION BELOW.

The opinion of the Court of Claims (R. 26)) is reported in 58 Ct. Cls. 671.

JURISDICTION.

The judgment appealed from was entered on April 2, 1923, (R. 31). A motion for a new trial was made June 1, 1923 and denied February 18, 1924, (R. 31). Appeal was taken May 15, 1924 (R. 31), under Section 242 of the Judicial Code (later repealed by the Act of February 13, 1925, Chap. 229, 43 Stat. 936, 939.)

It is respectfully submitted that the defendant's reply brief contains some statements which, if left unexplained, might be misleading. To point this out, and for the convenience of the court, the following reply brief is submitted on behalf of the appellant—the contractor.

THE QUESTIONS.

In stating "the questions" it appears that the defendant's brief (p. 2) does not clearly set forth all of the questions involved in the case. These questions are:

FIRST: THAT THE CONTRACT WAS WRONGFULLY ANNULLED.

SECOND: THAT IT WAS INCUMBENT UPON THE DEFENDANT TO SHOW THAT THE INCOMPLETED WORK WAS DONE UNDER A CONTRACT AND SPECIFICATIONS WHICH DID NOT MATERIALLY DEPART FROM THE ANNULLED CONTRACT AND THAT THE DEFENDANT HAS FAILED TO SHOW THIS.

ARGUMENT.

MATERIALS TO BE DREDGED, AND THOSE ACTUALLY DREDGED.

The defendant's brief devotes many pages in an attempt to show that the contractor had not been misled by the representations of the defendant as to the character of the materials to be dredged. As no claim is made by the contractor for damages for such misrepresentations, this is immaterial except as it might have

affected the contractor's plant and consequently required temporary suspension of the work for repairs.

That there was misrepresentations as to the materials supposed to be dredged and those actually dredged, there can be no question. Both the findings and the defendant's brief show this. On page 3 defendant's brief in quoting from the specifications as given in the findings, (R. 18-19) says:

> "The material to be excavated is believed to be mud, sand and gravel."

And on page 8 defendant's brief, in commenting on the good progress the contractor had made during the first four years of the work again quotes from the findings (R-21-22) which in referring to the plant, says:

> "It could and *did pump clay and cobble stones* in its hydraulic dredges, *and where stone was dredged* plaintiff was paid for dredging and at special prices." (Emphasis ours.)

And the court in its opinion says:

> "The borings in this stretch of 2.2 miles show mud, mud and sand, mud and shells, sand and gravel, and yet the ten-day reports *exhibit a strata of clay along the entire area. Clay is shown along with the above materials in some instances hard enough to put the pumps of the plaintiff out of commission.*" (R-28) (Emphasis ours).

THE CONTRACTOR'S KNOWLEDGE OF THE MATERIAL TO BE DREDGED.

Defendant's brief lays great stress upon the knowledge which the contractor is charged with possessing

of the character of the materials to be dredged. Much emphasis—the words even being emphasized, is put upon the statement which, according to common knowledge, the defendant puts in its printed form of proposal, and which it requires the contractors to sign, which statement is as follows:

> "We make this proposal with full knowledge of the kind, quantity and quality of the work required." (Deft's Brief, p. 5.)

Yes, knowledge "of the work required," but this is quite different from saying that the contractor has full knowledge of the character of material in a stratum of earth 4 feet thick and beneath 12 feet of water.

The contract provided for deepening the channel from 12 feet to 16 feet.

And, again, the brief refers with great satisfaction to the Court's remarkable finding (R-19) to the effect that because the contractor had dredged to a depth of 12 feet over the principal part of this channel, he must perforce and necessarily be thoroughly familiar with the character of the material between the limits of 12 and 16 feet below 12 feet of water.

Such contentions only go to show to what desperate lengths the defendant is driven in the loyal support of a poor case.

DEFENDANT'S BRIEF SAYS THAT:

> "Complete cessation of work by the appellant was a breach of the contract."

In order to support this contention, defendant's brief (p. 20) says:

"The contract in this case, among other things, provided (R-19) that:

> 'The required rate of work will be at least 50,000 cubic yards per month, unless otherwise authorized by the engineer. If at any time after the date fixed for the beginning of the work it shall be found that operations are not being carried on as rapidly *as required by the contract*, the engineer shall have power'

to proceed to procure other means of having the work performed. It was also provided that:

> '*No work will be required in the months of December, January, and February,* but it may be continued in these months if the contractor so desires. (R-19).' "

From this it appears that the inference is sought to be drawn that the engineer had authority under this provision to annul the contract; whereas, if the entire provision were quoted it would be found that it provides for the defendant to put extra forces on the work to COMPLETE IT ON TIME.

Furthermore, from this it is argued in defendant's brief that the contract required that a minimum of 50,000 cubic yards be dredged for each dredging month; whereas, it is perfectly plain from this entire provision, that what the contract actually provided for was that the work should be carried on at the average rate of 50,000 cubic yards per month, so as "to insure the *proper completion of the work within the time specified.*" (Emphasis ours.)

The part omitted from the defendant's brief, including the last five words of the part quoted is as follows:

> "The engineer shall have power, after due notice in writing to the contractor, to employ such additional plant or labor, or to purchase such material as may be necessary *to insure the proper completion of the work within the time specified.*" (R-11) (Emphasis ours)
>
> This the Engineer never did.

The time specified is easily arrived at by dividing the number of cubic yards the contractor agreed to dredge, viz; 4,177,110 cubic yards (R. 3) by 50,000 cubic yards per month for the nine dredging months per year. The contract contemplated a certain definite time for the completion of the work, and required dredging at a certain rate in order to insure the "proper completion" by that time. It was considered that the average rate of 50,000 cubic yards per month for nine months out of the year would accomplish this.

But the defendant's brief says:

> "The Government submits that all these provisions taken together require the contractor to excavate at least 50,000 cubic yards during each and every working month, and not, as appellant contends, to excavate an average of 50,000 cubic yards per month." (Deft's Brief, p. 21.)

One of the provisions of the contract itself clearly shows that all that was contemplated by the contract was an average rate of 50,000 cubic yards per month for the nine dredging months, and that the contractor would not be in default when dredging less than 50,000 cubic yards during any one or more months if this average of 50,000 cubic yards per month were maintained, as shown by the following provision of the specification:

"16. Payments for accepted work will be made monthly for material excavated and deposited, *and not previously paid for,* subject to the condition that no payment, *except the final one,* will be made for the excavation and deposit of *a quantity less than 50,000 cubic yards,* scow measurement, unless in the opinion of the Engineer the work has been unavoidably delayed by bad weather or unless a less quantity has been required by the Engineer in charge to be removed during the calender month next preceding the month of payment." (R. 8) (Emphasis ours.)

That the defendant's eengineers in charge of the work understood these provisions of the contract and sspecifications to be as contended for by the Contractor and *not* as contended for by the defendant is clearly shown by the following statement from the engineer in charge, as appears in the Findings of the Court:

"It appears from paragraph 4 of the Department letter above referred to, that the contractor will not be in default until July 29, 1913, if the required rate of work, 50,000 cubic yards per month, is used as the required amount of work to be accomplished up to that date. (R. 24)

In further support of defendant's theory that the contractor was required to dredge at least 50,000 cubic yards for each dredging month, the defendant's brief seems to put great reliance in a statement made in one of the findings of the court when referring to the period between January 1st, 1910 and September 24, 1912, which says that "in every month except three, plaintiff was in default in its monthly dredging work" (R. 22).

If this statement means that the contractor was in

default in dredging 50,000 cubic yards for each one of the dredging months during this time, that is, that if it had failed to dredge the full 50,000 cubic yards each month, it is correct, but if it means that the contractor had defaulted *in the performance of its contract* by not having dredged 50,000 cubic yards each month during the time, then it is not correct. However even if the Court of Claims had held the latter, it would be subject to review by this Court.

The contention of defendant's brief is predicated entirely upon the statement made in Finding VII (R. 21) of the Court which says:

> "After January 1st, 1910, the work was carried on spasmodically and the plaintiff was in default nearly every month up to September 24, 1912. During eight months in which work was required, no work was done and in every month except three plaintiff was in default in its monthly dredging work and in June, July, August, and September, 1912, it dredged 31,926 cubic yards instead of the minimum required by the contract, 200,000 cubic yards." (R. 21-22)

Now let us see how inconsistent this contention is. The Court says that "After January 1, 1910, the work was carried on spasmodically and the plaintiff was in default nearly every month up to September 24, 1912." (R. 21)

During this period, including September, there are twenty-five dredging months. It will be noted that in commenting upon the work done during this period between January 1, 1910, and September 24, 1912, the Court says no dredging whatever was done during eight months in which work was required. The Court further says that during the four months of June, July,

August and September of 1912, the contractor dredged less than the required 50,000 cubic yards per month and says nothing about the remaining three months of March, April and May. Therefore, it is a justified conclusion to assume that the full 50,000 cubic yards per month were dredged in each of these three remaining months, as it was evidently the Court's purpose to show that the contractor had been in default in dredging 50,000 cubic yards per month during this period. Counting the dredging months of 1912, we have seven of the above twenty-five dredging months accounted for, leaving a balance of eighteen dredging months in 1910 and 1911 to be accounted for. It would be fair to assume that these eight months in which no dredging whatever was done were equally divided during the two years of 1910 and 1911, particularly in view of the emphasis which the Court lays upon the so-called default of the contractor, beginning with January 1, 1910. This gives four months in 1910 in which no dredging whatever was done and it is only fair to assume that to the middle of August, 1911, there were some months in which no dredging was done during the five and a half months of that period so that it would be fair to assume that at least half of these four months in 1911, in which no dredging was done fell in the period between March 1st and the middle of August, 1911, thus giving at least six months between January 1, 1910, and August 14, 1911, in which no dredging whatever was done.

This is in accordance with the ten-day reports prepared by the defendant's engineers which show the progress of the work and to which the Court referred when it said:

> "and yet the ten-day reports exhibit strata of clay along the entire area. Clay is shown along with the above materials, in some instances hard enough to put the pumps of the plaintiff out of commission." (R. 29).

The same ten-day reports also contain the following data:

> "January 3, 1910. 1. Note: 'The cutter is broken off and the suction pipe and the pump choked up with rock, causing most of the delays.' "

This last statement is not, of course, referred to by the Court, although it is a part of the ten-day reports which show the progress of the work during the eight months in which no dredging was done as shown, by the Court and although the Court says in Finding VII:

> "that after January 1, 1910, the work was carried on spasmodically and the plaintiff was in default nearly every month up to September 24, 1912." (R. 21)

Now on August 14, 1911, the defendant solicited the contractor to enter into a supplemental agreement for the purpose of widening certain parts of the channel covered by the original contract and, mark you, in this supplemental agreement entered into August 14, 1911, after referring to the original contract, the following very pertinent language is used:

> "And whereas, *it is found advantageous* and in the best interest of the United States to modify the said contract as hereinafter specified, for the following reasons:
>
> "That since the said contract was entered into requests have been made upon the United States

by interested parties for the removal of a shoal in the Passaic River on the south side of the present lines of the work now being done under said contract. * * *

"Now, therefore, the said contract is, on this 3d day of August, 1911, hereby modified in the following particulars, but in no others.

"That the said contractor, Midland Land & Improvement Company, shall do the additional dredging required to widen the channel in the Passaic River on the south side of the present lines of the work now being done under said contract in the vicinity of the Listers Chemical Works. * * *

"Approved August 14, 1911, John C. Scofield, Assistant and Chief Clerk for the Secretary of War in his absence." (R. 15-16)

Thus we find that this supplemental agreement, approved August 14, 1911, is a complete answer to the contention in defendant's brief that the contract required that 50,000 cubic yards be dredged each dredging month; for this supplemental agreement shows conclusively that during this period between January 1, 1910, and August 14, 1911, of "spasmodic dredging," and the so-called default in the amount to be dredged each month, that the defendant's representatives, who negotiated the contract and who had charge of its execution, gave no such interpretation to it as is now contended for in defendant's brief, but gave it the same interpretation which the contractor then understood and now contends for.

It is respectfully submitted that the defendant is estopped from now setting up this defense after having given the stamp of its approval to the progress of the work notwithstanding there had been some so-called default in the monthly dredging, and after having lulled the contractor into a perfect state of security

on this point by entering into the supplemental agreement, because, as stated therein, it was found "advantageous" and "in the best interest of the United States" to have this contractor increase, by 10 per cent, the amount of dredging it had agreed to do.

The defendant's brief seems to rely upon the case of the United States vs. McMullen (222 U. S. 460), in support of its contention that the failure of the new contract with Breyman to provide for the removal of all the material that remained from the annulled contracts was not fatal to the defendant's right to the retained percentages. At the outset the court will observe that the facts in the McMullen case were vastly different from the facts in the instant case. Among them being that in the former the amount of yardage to be dredged depended upon appropriations therefor. This, as a matter of course, left the amount of work to be performed uncertain of determination. In the instant case, however, there was no uncertainty as to the scope of the work, the exact number of cubic yards to be dredged under the original contract were specifically set out and when the second contract was let for a part only of the work called for, the defendant destroyed its means of determining liability.

The defendant's brief says:

> "The above decision (McMullen v. U. S.) is discussed and approved in U. S. v. Axman, 234 U. S. 37."

This is true, and in the Axman case the distinction is clearly pointed out between that case and the McMullen case. It is respectfully submitted that the principle applied in the Axman case is correct and is perfectly

applicable to the instant case, while the principle announced in the McMullen case is not at all applicable.

In distinguishing between the two cases, this Court said, at page 44:

> "We thus observe that in the McMullen case it was found that the liberty given to the second contractor to dump in deep water did not change the contract, because in the first contract the government reserved an absolute right of choice in this regard. In the present case there was no such right of choice. The place of dumping spoil was made, as we have said, a specific requirement of the contract."

It will be observed that in the Axman case the only difference between the first and the second contract, was a change in the place of dumping the spoil, this being more advantageous under the second contract.

At page 43, this Court said:

> "The government insists that the main purpose of the original contract was to secure the dredging of the channel, and that the place of dumping the spoil was but incidental."

And further, at page 45, this Court said:

> "In the McMullen case, in treating of the right reserved in the first contract giving the government an absolute choice of the dumping ground, it was concluded, 'whether the object of the contract was attained is immaterial, so long as the work done towards it was work that the first contractor had agreed to perform.' We are clearly of the opinion in this case that the work done under the second contract was not the work which the first contractor had agreed to perform. While it

> is true it accomplished the dredging of the channel in the same bay, it did this with a disposition of the spoil not permitted under the first contract, and in a material matter was different from the contract first entered upon."

So in the instant case, while the dredging done under the second contract was in the same channel, it was for a different yardage than provided for in the first contract. And there can be no doubt but that the areas to be dredged under the two contracts were different. As shown in the contractor's original brief, page 25 there was a difference of 112,932 cubic yards between the amount remaining to be dredged under the original contracts and that actually dredged by Breymann under the new contract. If there could be a variation of more than a hundred thousand cubic yards in the amount of dredging to be done under the second contract, there is no limit in principle to which this variation might be carried. If, as held in the Axman case, a difference in the place of dumping the spoil constituted a material variance in the contracts, surely a difference in the area, amounting to 112,932 cubic yards to be dredged under the annulled and the new contracts, in the instant case, would constitute a greater variance between these two contracts, than there was in the Axman case.

It is true, as stated in defendant's brief at page 32, that the Court found that

> "the uncompleted part of the work"

covered by the two old contracts was relet, yet, as pointed out in the contractors original brief, at page 25, other findings show that there was a difference of 112,-

932 cubic yards in the area to be dredged under the annulled contracts and that actually dredged under the second. Furthermore, it is earnestly urged that nowhere in the Findings of Fact, or the opinion of the Court below is it shown or stated that the uncompleted part of the work was relet or done under a CONTRACT which did not materially depart from the first contracts. It is true that it is stated in the findings that the work was advertised under the same specifications, etc., but nowhere is it shown that the incompleted work was relet even under the same specifications, etc., as the annulled contracts.

CONCLUSION.

Therefore, it is respectfully submitted:

FIRST: That the contract was wrongfully annulled;

SECOND: That it has not been shown that the incompleted work was relet, or done under the same specifications and contract as the annulled contracts, as was encumbent upon the defendant to do;

THIRD: That the contractor is entitled to recover from the defendant the retained percentages, amounting to $33,998.17.

Respectfully submitted,

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